

SECTION B

QUESTIONS AND ANSWERS

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ON THE USE OF DAVIS-BACON WAGE DETERMINATIONS

1. Question: What should I do if my weekly transmittal is skipped in the mailings I receive?

Answer: The Government Printing Office will respond to complaints regarding your subscription to General Wage Determinations. The complaint number is (202) 512-2303.

2. Question: How do I obtain a wage determination for a construction project to be performed at a location not covered by a published determination?

Answer: If no general wage determination is listed for a given county and type of construction, use the following procedure to obtain a project wage determination:

The Federal agency funding or financially assisting the construction project requests a wage determination under the Davis-Bacon Act or any of the related prevailing wage statutes by submitting a Standard Form (SF) 308 to the following address:

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Branch of Construction Wage Determinations
200 Constitution Avenue, N.W., Room S-3014
Washington, D.C. 20210

In completing an SF-308, the agency must furnish:

- (1) A sufficiently detailed description of the project to indicate the type of construction involved. Additional descriptions or separate attachments, if necessary for identification of the type of project, must be furnished.
- (2) The county (or other civil subdivision) and State in which the proposed project is located.

The time required for processing requests for wage determinations varies according to the facts and circumstances in each case. An agency should anticipate that such processing will take at least 30 days.

3. Question: The wage determination applicable to my project does not contain a class of workers which is needed to complete construction. Can a worker classification and wage rate be added to an existing wage determination?

Answer: **Prior to bid opening**, if the only classification that will be needed for a contract is not listed on a general wage determination for the type of construction in the area, the contracting/assisting agency may submit an SF-308 request for a project wage determination for application to that project. In order to assure special treatment of a request where this circumstance exists, a note explaining the special circumstances should be made in the project description block of the SF-308. A similar note may be made on SF-308 requests for project wage determinations where a general wage determination is not available and all of the work on the project will be performed by a particular classification, as a means to assure that a wage rate for the classification will be issued for that project.

Example: An upcoming contract calls for repainting all the residences at a military base, and there is no painter classification in the wage schedule issued for application to residential construction in the county where the project is located. An SF-308 may be submitted by the agency for application to that contract, and a project wage determination will be issued with a painter classification and wage rate. If there were no general wage determination issued for that area, and a project wage determination was issued for the area without a painter classification and rate, a painter classification could be added by issuance of a modification to the project wage determination (for use prior to bid opening, or the other applicable date where certain assistance programs of the Department of Housing and Urban Development (HUD) are the basis for coverage under the Davis-Bacon and related Acts).

After contract award, if the contract wage determination does not contain a class of workers which is needed to complete construction, a contractor shall submit to the contracting officer a request for the addition of any needed classification of laborers or mechanics not listed in the wage determination, together with proposed wage rates and fringe benefits conformable to the wage determination.

The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract be classified in conformance with the wage determination. **An additional classification action, even if undisputed, is not valid unless the Department of Labor has approved it. If a dispute exists, the matter must be referred to the Wage and Hour Division for resolution, together with the views of all interested parties and the recommendation of the contracting officer.**

Approval of the additional classification and the proposed wage rate and fringe benefits requires that the following criteria have been met:

- (1) The work to be performed by the classification requested is not performed by any classification in the wage determination; and
- (2) The classification is utilized in the area by the construction industry; and
- (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination; and
- (4) There is evidence of agreement on the classification and proposed wage rate among the parties involved, or the views of those involved -- the contractor(s), employees (if known) or their representative, and the contracting officer/agency -- are forwarded for consideration by the Wage and Hour Division; and
- (5) The request does not involve wage rates for apprentices or trainees.

All conformance notices should be responded to in writing within 30 days of receipt. These responses either approve or deny the request or inform the submitting agency that additional time will be required. **Failure to receive a response does not constitute approval. If a response is not received, the Wage and Hour Division must be contacted directly.** Every conformance request is analyzed to verify that the criteria for approval are met.

4. Question: How do workers on a construction site know that a project is covered by the Davis-Bacon Act? How do they know the prevailing wage to which they are entitled?

Answer: The wage determination (including any additional classifications and wage rates conformed) and a Davis-Bacon poster (WH-1321) must be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen. The WH-1321 poster may be obtained at no charge from offices of the Wage and Hour Division. In the absence of such posted information, any person who wants to determine if the project is covered should contact the federal agency funding or assisting the project or the Wage and Hour Division. Multi-year construction contracts that contain option provisions by which a contracting agency may unilaterally extend the term of the contract require inclusion of a current wage determination at the time the option is exercised. (In contrast, in situations where a contractor is given additional time to complete original contract commitments, the wage determination in that contract applies.)

5. Question: Once construction has begun, are the workers' wage rates affected when the wage determination for the area in which the project is located is changed?

Answer: As a general rule, the wage determination incorporated into a bid solicitation and related contract award establishes the minimum wage rates and fringe benefits which must be paid for the entire term of the contract.

Where the proper wage determination is incorporated into a contract prior to award of the contract, wage determination modifications issued after bid opening are not applicable to the contract -- except in the case of a general wage determination in a contract that has not been awarded within 90 days after the bid opening and an extension of the 90-day limit has not been granted. (Specific requirements involving dates other than bid opening apply for projects assisted under the National Housing Act and for projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937).

Upon his or her own initiative or at the request of an agency, the Administrator may correct any wage determination if he or she finds that the determination contains an inadvertent clerical error. For example, a wage determination contains a wage rate where there is a transposition of numbers, such as a fringe benefit of \$2.53 appears in the wage determination as \$2.35.

Also, the Administrator may issue a wage determination after contract award or after the beginning of construction if:

- (a) the contracting/assisting Federal agency has failed to incorporate the applicable wage determination in a contract required to contain prevailing wage rates determined in accordance with the Davis-Bacon Act, or has used a wage determination which by its terms or the provisions of Regulations, 29 CFR Part 1, clearly does not apply to the contract, or
- (b) the wrong wage determination has been incorporated in the contract because of an inaccurate description of the project or its location in the agency's SF-308 request.

Under either of these two circumstances, the agency shall either terminate and resolicit the contract with the valid wage determination, or incorporate the valid wage determination retroactive to the beginning of construction through supplemental agreement or through change order, provided that the contractor is compensated for any increases in wages resulting from such change. The method of incorporation of the valid wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable procurement law.

6. Question: Is it possible for more than one wage schedule to apply to contract specifications?

Answer: Construction projects are generally classified as either Building, Heavy, Highway or Residential for purposes of issuing wage determinations. Wage schedules for one or more of these construction categories may have application to construction items contained in a proposed construction project. Guidelines for the selection of proper wage schedules are set forth in All Agency

Memoranda Nos. 130 (March 17, 1978) and 131 (July 14, 1978). (See Section C of this transmittal.) Any questions regarding the application of these guidelines to a particular project, or any disputes regarding the application of the wage schedules issued for the various construction categories are to be referred to the Wage and Hour Division, together with relevant information, including a complete description of the project and area practice.

7. Question: As the contracting officer/Federal agency representative, what is my obligation when the wage determination or wage determinations applicable to a construction project contain multiple wage schedules?

Answer: It is the responsibility of the contracting officer/Federal agency representative to advise contractors which schedule of prevailing wages shall be applied to the various construction items in the bid specifications. Because of the complexities in the application of multiple schedules (see discussion in Answer to Question 6, above), the contracting officer should consult with the Wage and Hour Division to resolve any questions.

8. Question: Can apprentices, trainees, and/or helpers work on a project covered by the Davis-Bacon or related Acts (DBRA), and what wage rates must they be paid?

Answer: Individuals who meet the following definition may be employed as **apprentices** on DBRA projects:

- (a) A person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or
- (b) A person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been properly certified to be eligible for probationary employment as an apprentice.

Trainees employed must be persons registered in a construction occupation under a program which has been approved in advance by the U.S. Department of

Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which have been so certified by that Administration.

Note that information on wage rates paid to apprentices and trainees is not solicited nor do the wage determinations issued include apprentice classifications. Similarly, their addition through the additional classification procedure (conformance) is neither necessary nor appropriate. On projects funded by the Federal Aid Highway Act, apprentices and trainees certified by the Secretary of Transportation are not covered by Davis-Bacon labor standards.

The proper wage rates to be paid to apprentices and trainees are those specified by the particular programs in which they are enrolled, expressed as a percentage of the journeyman rate on the wage determination. In the event employees reported apprentices or trainees on a covered project have not been properly registered within the meaning of the Regulations and the contract stipulations, or are utilized at the job site in excess of the ratio to journeymen permitted under the approved program, they must be paid the applicable wage rates for laborers and mechanics employed on the project performing the kind of classification of work they actually performed. This applies regardless of work classifications which may be listed on the submitted payrolls and regardless of their level of skill.

Recently, there have been legal changes with regard to **helper** classifications. On October 21, 1993, President Clinton signed the Fiscal Year 1994 Appropriations Act for the Department of Labor, Health and Human Services and Education and related agencies (P.L. 103-112), which contains a provision that prohibits the use of funds appropriated to the Department of Labor to implement or administer the Davis-Bacon "helper" regulations that had allowed the expanded use of helpers on construction projects to which the labor standards of the Davis-Bacon and related Acts apply.

To implement this change, effective October 21, 1993, the Department of Labor ceased activities that were related to the administration and implementation of suspended helper regulations.

Effective on October 21, 1993, the "helper" regulations were suspended and former rules concerning the conformance process for adding classifications after contract award were reinstated at 29 CFR Part 5, section 5.5(a)(v). (See Notice published in the *Federal Register*, at 58 FR 58954 on November 5, 1993, and included in Section D, below).

The definition of "helpers" in the suspended regulations that allowed the expanded use of helpers is no longer in effect. Helper classifications may be issued or added to a wage determination only where the duties of the helpers are clearly defined and distinct from those of the journeyman classification and from the laborer, and the use of such helpers is an established prevailing practice, and where the term "helper" is not synonymous with "trainee" in an informal training program.

More detailed information concerning implementation of this prohibition is contained in All Agency Memorandum No. 174, dated December 2, 1993. (See Section D of this transmittal).

9. Question: What wage rates must be paid to supervisory employees (foremen, general foremen, superintendents, etc.) employed on a covered project?

Answer: The wage rates for bona fide supervisory employees are not regulated under the Davis-Bacon and related Acts since their duties are primarily administrative or executive in nature rather than those of laborers or mechanics. However, such employees who devote more than 20 percent of their time during a workweek to mechanics or laborer duties are laborers and mechanics for the time so spent, and must be paid at least the appropriate wage rates specified in the wage determination. Employees who are bona fide executive, administrative, or professional employees as defined under the Fair Labor Standards Act at 29 CFR Part 541 are not covered by the Davis-Bacon Act.

10. Question: If it is believed that the rates on a wage determination do not accurately reflect those prevailing in the area, how may the wage determination be appealed?

Answer: Any interested person requesting reconsideration of a wage determination or of a determination regarding application of a wage decision should

present their request in writing accompanied by a statement with any supporting data or other pertinent information to the Wage and Hour Division. The Wage and Hour Division should respond within 30 days or notify the requestor within this time frame that additional time is needed.

An "interested person" is considered to include, without limitation:

- (1) Any contractor, or an association representing a contractor, who is likely to seek or to work under a contract containing a particular wage determination, or any laborer or mechanic, or any labor organization which represents a laborer or mechanic, who is likely to be employed or to seek employment under a contract containing a particular wage determination, and,
- (2) Any Federal, State, or local agency concerned with the administration of a proposed contract or contract containing a particular wage determination issued pursuant to the Davis-Bacon Act or any of its related statutes.

If reconsideration of a wage determination has been sought and denied, an appeal for review of the wage determination or its application may be filed with the Wage Appeals Board, U.S. Department of Labor, Room N-1651, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Requests for review of wage determinations must be filed, and any new wage determination resulting from the appeal must be issued, before contract award or start of construction where there is no award (or under the National Housing Act, before the date of initial endorsement, or the beginning of construction, whichever occurs first; or under Section 8 of the U.S. Housing Act of 1937, before the date of the housing assistance payments agreement, or the beginning of construction, whichever occurs first).

The Wage Appeals Board was established by the Secretary of Labor in 1963 to decide, at its discretion, appeals concerning questions of fact and law related to final decisions of the Wage and Hour Division concerning:

- o Controversies over the payment of prevailing wage rates, overtime pay, or proper classifications;

- o Wage determinations issued under the Davis-Bacon and related Acts;
- o Debarment cases arising under 29 CFR Part 5;
- o Cases involving the assessment of liquidated damages under the Contract Work Hours and Safety Standards Act;
- o Appeal of any other final decision under 29 CFR Parts 1, 3 or 5.

The Board consists of three members, one of whom is designated chairman. The members are appointed by the Secretary of Labor and majority vote of the Board is necessary for decision, except that a decision to hear any appeal may be by one member. The Board can act as fully and finally as the Secretary of Labor concerning the matters within its jurisdiction. The rules prescribed in 29 CFR, Part 7, "Practice Before Wage Appeals Board", govern the proceedings of the Board.